U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

February 21, 1991

In the Matter of:

Operative Plasterers and Cement Masons
International Association/
National Plastering Industries
Joint Apprenticeship Fund,
Appellant,

v. Case No.: 89-BCA-6

U.S. Department of Labor,
Respondent.

(Contract Nos. 99-4-0380-35-004 99-4-0380-35-038)

ORDER AWARDING ATTORNEY'S FEES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

On May 23, 1989, Operative Plasterers and Cement Masons International Association/National Plastering Industries Joint Apprenticeship Trust Fund (hereinafter "appellant") appealed the contracting officer's Final Determination dated March 2, 1989 in which $583,821 in costs were disallowed, with a total of $580,420 subject to debt collection, under contract nos. 99-4-0380-35-004 and 99-4-0380-35-038. Appeal File (AF.) 5-7, 9-11. These contracts required that the appellant provide "training in the crafts of plastering and cement masonry." AF. 68. On January 18, 1990, Frank P. Buckley, counsel for the government, advised that the $580,420 of disallowed costs would not be subject to debt collection and the appellant seeks attorney's fees pursuant to the Equal Access to Justice Act, at 5 U.S.C. § 504, stating that it is a qualified prevailing party and that the government's position in this matter was not substantially justified.

Procedural Background

Upon motion by the government, an Order of Dismissal in the above-captioned matter was issued on January 25, 1990 wherein the Board noted that previously disallowed costs would not be subject to debt collection. The appellant filed a Motion for Reconsideration with the Board on February 6, 1990 and argued that a voluntary

dismissal by the government of its claim may not afford the appellant sufficient grounds to be a "prevailing party" under the Equal Access to Justice Act thereby foreclosing an award of attorney's fees. An Order reinstating the matter for hearing was subsequently issued by the Board on May 4, 1990 and the Order of Dismissal dated January 25, 1990 was vacated.

The government filed a second Motion to Dismiss on June 7, 1990. On June 8, 1990, a telephone conference occurred between Judge Glenn Lawrence and counsel for the parties at which time arguments were presented regarding the second Motion to Dismiss. During the conference, the appellant urged that the government's position was groundless and that a second audit of the appellant was conducted which resulted in the same types of erroneous disallowances at issue in this case.

On July 25, 1990, the Board issued an Order Regarding Second Motion to Dismiss requesting that the second audit of the appellant dated March 27, 1990 be filed or, alternatively, that the case be dismissed with prejudice and the appellant could file an application for attorney's fees pursuant to the Equal Access to Justice Act, 5 U.S.C. 504(a)(1). On August 23, 1990, Daniel E. Schultz, counsel for the appellant, filed an Application for Counsel Fees and Costs Pursuant to the Equal Access to Justice Act. The total amount requested was $3,212.00 which was the result of multiplying an hourly rate of $220.00 times 14.60 hours. The requested fee covers a period of time from May 15, 1989 to August 23, 1990.

On September 28, 1990, the government filed a Motion for Extension of Time in which to file its opposition to the fee petition. An Order Granting Extension of Time was issued by the Board on October 12, 1990 and the Contracting Officer's Memorandum Opposing Appellant's Application was received on November 13, 1990.

On January 10, 1991, an Order to Show Cause was issued by the undersigned requesting verification by the appellant that it employs fewer than 500 people as required in section 504(b)(1)(B) of the Act or, in the alternative, why the application for attorney's fees should not be denied. On January 23, 1991, the appellant filed a Response to Show Cause Order With Verification. An affidavit of Gilbert A. Wolf, who is Administrator of the Operative Plasterers and Cement Masons Association Job Corps Programs and an officer of the National Plastering Industries Joint Apprentice Trust Fund, is dated January 22, 1991 and he states "[t]hat both the Association and the Trust Fund have fewer than 500 employees."

Discussion and Conclusions

The Board is authorized to grant attorney's fees under the Equal Access to Justice Act (hereinafter the "Act") to a qualified prevailing party unless "substantial justification" or "special circumstances" are shown to exist. 5 U.S.C. § 504(b); Pierce v. Underwood, ___ U.S. ___, 108 S. Ct. 2541 (1988). The purpose underlying the Act is to reduce the economic deterrents involved in contesting unreasonable government actions. Gold Laber v. Foley, 698 F.2d 193, 197 (3d Cir. 1983); Everett Plywood Corp. v. United States, 3 Ct. Cl. 705 (1983). Consequently, the government carries the burden of proving that its position was "substantially justified" or that "special circumstances" exist which make it inappropriate to award attorney's fees under the Act. Derickson Co. v. N.L.R.B., 774 F.2d 229 (8th Cir. 1985); Charter Management, Inc. v. N.L.R.B., 768 F.2d 1299 (11th Cir. 1985).

Subsection 504(b)(1)(B) of the Act directs that attorney's fees may be awarded only to a qualified party and defines "party" in terms of net worth and number of employees. However, the appellant asserts that it is a non-profit tax exempt organization under 26 U.S.C. § 501(c)(3). Subsection 504(b)(1)(B) of the Act states "that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)(3)) which is exempt from taxation under section 501(a) of such Code ... may be a party regardless of the net worth of such organization...." 5 U.S.C. § 504(b)(1)(B). Moreover, the appellant employs fewer than 500 people as required by section 504(b)(1)(B) of the Act. Therefore, the appellant in this case satisfies the definition of a "party" under the Act.

The Act further requires that attorney's fees only be assessed for a "prevailing" party. 5 U.S.C. § 504(a)(1). The term "prevailing" is not defined in the Act but has been liberally construed by the courts to include appellants who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit". Hensley v. Eckerhart, 461 U.S. 424 (1983) (quoting Nudeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978); Anthony v. Bowen, 848 F.2d 1278 (D.C. Cir. 1988), cert. denied, 109 S.Ct. 1119 (1988). The Federal Circuit Court of Appeals reviewed the legislative history of the Act in Austin v. Department of Commerce, 742 F.2d 1417, 1420 (Fed. Cir. 1984) and concluded that "[a] party will be deemed prevailing if he obtains a settlement of his case; if the plaintiff has sought a voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues" (emphasis added). The government in this case voluntarily seeks a dismissal of its claim and is allowing costs totalling $576,788 in full. Therefore, the appellant is properly considered a "prevailing" party under the Act.

Moreover, the government has not carried its burden to show that its position in this matter was "substantially justified" or that "special circumstances" exist whereby an award of attorney's fees would be inappropriate under the Act. The appellant contends that the government's position for its disallowance of costs in this case "was completely erroneous and one for which the government had no factual basis...." In a letter dated May 23, 1989, Daniel E. Schultz, counsel for the appellant, noted the following:

> [A]t a November 10, 1988 meeting with the contractor and the DACAR staff on the audit in question, it was agreed that the auditors involved would be requested to further review the contractors (sic) financial records regarding the major disallowed item, the $576,788 item which relates to the merchandise furnished by the contractor in performing the contract. The OIG did request the reassessment by the auditors following the meeting and the understanding had been that no final decision would be made until a final report had been issued by the auditors regarding the reassessment/further supplemental audit. That did not occur. In fact the March 2, 1989 Final Decision was issued even before the preliminary report or supplemental audit had been prepared by the auditors which did not occur until March 6, 1989.

AF. A1-5.

The United States Supreme Court in Pierce determined that "a position can be justified even though it is not correct and ... it can be substantially justified if a reasonable person could think it correct, that is, it has a reasonable basis in law and fact." Id. at 566, n. 2. However, the standard of "substantial justification" comprises "more than mere reasonableness." Schuenemeyer v. United States, 776 F.2d 329, 330 (Fed. Cir. 1985). Indeed, the government's position must be "clearly reasonable" and the mere existence of a colorable legal basis alone is insufficient. Gavette v. OPM, 785 F.2d 1568 (Fed. Cir. 1986) (en banc). In particular, the government must show that it has not "persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation." Id. at 1571.

The government in this case asserts that it properly relied upon the findings of an audit report and that with "the necessity of acting on these findings within required time imperatives, it is submitted that the contracting officer was under an obligation, if not a duty, to disallow the costs in question." The Board agrees that an auditor's findings may properly form the basis for disallowances in the Final Determination. However, an audit alone cannot turn a position taken by the government into one which is reasonable and, thus, substantially

justified. Indeed, the circumstances surrounding the issuance of the March 2, 1989 Final Determination in this case support a finding that the government's position was not "substantially justified." The appellant's May 23, 1989 letter indicates that the government was aware that the $576,788 in disallowances under Finding I was incorrect and that another audit was necessary. Moreover, the government noted in its Final Determination that "[t]he OIG has procured the services of the auditors to reassess the contractor's financial records to determine the propriety of the ($576,788 in) charges." AF. A-6. The government has not shown that it reasonably relied on the auditor's findings in asserting its position on this appeal. Consequently, the Board finds that the appellant is entitled to an award of attorney's fees.

Upon review of the fee application submitted by the appellant, the Board initially notes that it can award fees at an hourly rate greater than $75.00 an hour as set forth in subsection 504(b)(1)(A)(ii) if the appellant presents a regulation or special factors which would justify modification of the statutory cap. Jen-Beck Associates, Inc. (ASBCA) 89-3 B.C.A. ¶ 22,157 (1989). The appellant in this case requests an hourly rate of $220.00 and the circumstances surrounding this case justify such an award. The amount in dispute, totalling $576,788 in disallowed costs, is substantial. Moreover, the complexity of the issues involved in the practice of government contracts law as well as the rates usually charged in this area constitute special factors which justify an increase in the hourly rate. Accordingly, this Board finds that an hourly rate of $220.00 is reasonable.

Finally, the hours claimed while pursuing this appeal appear fair and reasonable except for time requested after the government stipulated that the $576,788 in costs under Finding I would not be subject to debt collection. Consolidated Technologies, Inc. (ASBCA) 89-2 B.C.A. ¶ 21,868 (1989). The appellant pursued this appeal after the January 26, 1990 Order of Dismissal was issued because he was uncertain whether the appellant would be considered a "prevailing" party under the Act where the government agrees, prior to a hearing, that certain costs are not subject to debt collection. The appellant also asserted that the government disallowed similar costs under another contract and that a decision on the merits of this appeal was necessary to prevent further litigation on these types of costs. However, the appellant did not consent to a consolidation of appeals and, as a consequence, this Board was left without any issues of law or fact to be decided. Thus, a total of 6.2 hours, which were spent subsequent to the issuance of the January 26, 1990 Order of Dismissal, did not contribute to the success of this appeal on the merits and they are disallowed. The appellant is entitled, however, to the 1.0 hour requested for the preparation and filing of the fee petition. See Schuenemeyer, 776 F.2d at 333.

ORDER

IT IS THEREFORE ORDERED that the Department of Labor pay the sum of $1848.00 to the appellant for legal services rendered in connection with this appeal and for preparing and filing the fee application.

Glenn Robert Lawrence
Member of the Board of
Contract Appeals

I CONCUR:
Nahum Litt
Chairman of
the Board of Contract Appeals

I CONCUR:
Samuel B. Groner
Member of
the Board of Contract Appeals